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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 456

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BATA SHOE COMPANY, INC. and UNITED SHOE WORKERS OF AMERICA, AFL-CIO

BRIEF OF RESPONDENT BATA SHOE COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Although the Petitioner makes it appear that the question presented is whether the court below applied the wrong standard of judicial review, such is not the case.

The court below refused to enforce the Board's order on two grounds:

1) The maladministration of the election by the Board.

2) Material misrepresentations in the Union's election eve literature.

With respect to the first ground, the court below found that the Board had "abused its discretion" in failing to set aside the election because of its maladministration of the election. The Petitioner admits that on this aspect of the case "abuse of discretion" is the proper standard for judicial review so the question presented is not whether the court below applied the wrong standard. Petitioner is merely contesting the court's conclusion on this point.

With respect to the second ground on which the court below refused to enforce the Board's order, Petitioner again states that the question presented is whether the court below applied the wrong standard of judicial review. Actually, the court applied the substantial evidence test to the factual questions presented and found that the Board erroneously failed to apply the Board's own standards in not setting aside the election because of material misrepresentations in the Union's election eve literature. Petitioner concedes that the substantial evidence test is the correct standard for review of questions of fact, but contends there were no factual questions for the court to determine.

The question which Petitioner presents, therefore, is not whether the court below applied the wrong standard of judicial review. Petitioner seeks to attack the reasonableness of the determination of the court below when the court applies correct standards of judicial review. Accordingly, it is submitted that the real question is:

Whether this Court should review the decision of a court of appeals which applied the correct standard for judicial review and where no other error is claimed?

Counterstatement of the Case

This litigation involves the validity of an election where a shift of three votes in a unit of 2,583 employees could alter the results.[1]

In its "Exceptions to the Regional Director's Report on Objections" to the representation election, the Company set out 23 incidents which it maintained individually necessitated setting aside the election and cumulatively "clearly compelled" this action (App. B, p. 24, fn. 3).[2] In these objections, the Company contended that the employees were subjected to repeated misrepresentations, several incidents of actual threats, restraint and violence, numerous acts of misconduct on the voting line and in the polling place and irregularities in the procedures followed in the conduct of the election (J.A. 169-172).

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[1] There were approximately 2,583 eligible voters and 2,159 ballots cast. 1,082 were cast for the Union, 1,036 were cast against the Union. There were 41 challenged ballots and 6 void ballots (J.A. 65). If the challenged ballots were added to the votes cast against the Union, there remains a narrow difference of 5 votes. Consequently, a shift of 3 votes could make the challenged ballots determinative and alter the results of this election. In the last representation election conducted in December, 1963, the Board found all those who had cast challenged ballots were eligible to vote and that all had voted against the Union (App. B, p. 41, fn. 18). (Appendix B when used herein refers to Petitioner's Appendix B.)

[2] Petitioner erroneously stated in its petition that "the court of appeals agreed with the Board that those objections were insufficient to invalidate the election" (Pet., p. 4, fn. 4). While it is true that the court below found no quarrel with reference to the Board's resolution of challenges to several isolated Union campaign leaflets, the court specifically concluded by stating "it is unnecessary to consider the remainder of the Company's objections to the election" (App. B, p. 43). Clearly, the court did not "agree with the Board that those objections were insufficient to invalidate the election," but on the contrary, withheld any determination on these objections in view of its decision to refuse enforcement of the Board order on the two grounds specified.

In order to obtain court review of the Board's decision under the procedures provided by the Statute, the Company refused to bargain with the Union pursuant to the Board's order.[3] The Board requested the court below to enforce its order.

The court of appeals denied enforcement of the Board's order on the basis of two of the objections raised by the Company.

First, the court found that the Board erred in not setting aside the election under its own standards where the leaflet distributed by the Union on the eve of the election, April 22, contained material misrepresentations of fact made by a party in an authoritative position to know the truth in circumstances which prevented an effective reply prior to the election (App. B, p. 40).

Second, the court found the Board abused its discretion in refusing to set aside the election where there were irregularities in the voting procedure caused by the substantial omissions of the Board agents responsible for the balloting (App. B, pp. 41-43).

Judge Bryan, concurring specially, stated:

> "Clearly, the Board's order should not be enforced, for the reasons, at the least, assigned in the Court's opinion." (App. B, p. 43).

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[3] Section 9(d) of the National Labor Relations Act, 29 USC, Sect. 159(d) provides that when a representation determination forms the basis of a Board unfair labor practice order and that order is before a court of appeals for review under Section 10(e) or (f) of the Act, the record in the representation case shall be filed in the court of appeals and the representation determination reviewed at that time. There has been no allegation or finding that the Company has engaged in any other unfair labor practice. "Moreover, no opprobrium attaches to an employer's refusal to bargain where, as here, the refusal is based upon the employer's desire to test the Board's . . . findings in an underlying representation proceeding." *Metropolitan Life Ins. Co.*, 156 NLRB 1408, 1410.

The Board's statement of the case requires amplification and correction.

The election agreement, a Stipulation for Certification upon Consent Election, entered into by the Company and the Union and approved by the Board's Regional Director, provided, not only, that an election was to be held on April 23, 1965 but also specified that the hours of the election were to be from "8:00 a.m. to 12:00 noon and 1:00 p.m. to 5:15 p.m." and these were the only hours publicized to eligible voters (J.A. 128).

Shortly before 5:15 p.m. on the day of the election, when according to the Stipulation for Certification upon Consent Election, the polls should close, the Board agent in charge caused an announcement to be made to employees over the public address system that "to be eligible", employees must be in the voting line by 5:15 p.m. (J.A. 113).

At about 5:16 p.m. the Board agent went to the end of the line of voters, which extended across the service road and down the side of the building opposite to the building which contained the voting booths (J.A. 113). An employee, Frank Chenoweth, who had in fact been on the voting line before 5:15 p.m. and had stepped off the line to enter a washroom, was seen by the Board agent when he tried to return to the line (J.A. 115). The Board agent in charge refused to accept Chenoweth's explanation and required Chenoweth to leave the line, holding that Chenoweth was "not eligible" because, in his opinion, he had not been on the line before 5:15 p.m. (J.A. 115).

The Board agent instructed the last three men in line that the line was closed and that if anyone attempted to get in line after them such persons should be directed to the polling place to consult with a Board agent (J.A. 113).

He, himself, did not remain at the end of the line, but returned to the polling place which was in the opposite building (J.A. 113).[4] Upon looking out the window, he observed several employees in line behind those designated as the end of the line (J.A. 113). He went back out and was advised by the three men at the end of the line that these employees had been waiting in the lobby of the building since 5:15 p.m. and were therefore "eligible" (J.A. 113). The Board agent permitted these men to remain in line and then, at about 5:20 p.m., went into the lobby of the building and observed eight to ten people who explained to him that they had been there since 5:15 p.m. The agent permitted them to get in line (J.A. 113-114).

Chenoweth got in line again and reached the polling place, but was denied the opportunity to cast even a challenged ballot by the Board agent (J.A. 115).

Although the Board agent had instructed the three men at the end of the line that the line was closed and if anyone attempted to get in line after them to refer them to a Board agent, they did not do so in all cases and more than thirty employees got on the end of the line which was outside the building after 5:15 p.m. (J.A. 113, 114).

Another employee got on line as late as 6:30 P.M. and voted without question (J.A. 114).[5]

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[4] Petitioner inaccurately claims that the Board agent could not remain at the end of the voting line because he had to be in the polling area (Pet., p. 6). No such finding was made. Actually, the Regional Director's report shows that there were three Board agents conducting the election (J.A. 107). In addition, there were three observers for each party, making a total of nine authorized personnel to conduct the election. No explanation has ever been given why a Board agent or authorized observer was not detailed to watch the end of the line.

[5] Petitioner reiterates the same argument made by the Board to the Fourth Circuit attempting to assign some of the delays in vot-

Union observer Helen Stout refused to vote at 1:00 p.m. when the Board agent suggested that eligible observers vote. At 6:55 p.m., after Chenoweth had been denied the right to vote even a challenged ballot, the Board agent permitted Helen Stout to cast her ballot (J.A. 116).

In the immediately previous election, which was held under identical conditions (except for the maladministration of the election which occurred in the instant election), 92% of the eligible employees voted. Only 83% of the eligible voters voted in the instant election. Or, stated another way, 418 voters did not vote in the instant election as contrasted with only 173 non-voters in the preceding election (J.A. 105).

On these facts, the court below felt that a fair and equal opportunity for all Company employees to vote was precluded by actions of the Board agent responsible for the election (App. B, p. 42). The court stated:

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ing to the Company contending that the eligibility list was not corrected to reflect transfers after the eligibility date (Pet., pp. 5-6, fn. 6)

The record showed that the Company prepared the eligibility list in accordance with the specific instructions of the Board agent (J.A. 166). The list was set up by departments and was made up in the same way as in previous elections and it proved adequate in those elections (J.A. 106, 166). Further, the list was submitted for inspection to the two Union organizers, the Union-in-plant committee and the Board agent on Wednesday, April 21, 1965 (J.A. 77, 166). This inspection lasted from 10:00 a.m. to 4:30 p.m. on that date (J.A. 77). The members of the Union-in-plant committee who were employed in the departments and were observers in the previous election (J.A. 82) were certainly in a position to know whether there had been transfers since the list was prepared and were in a better position than the Company to realize if such transfers would delay the voting. The eligibility list was, therefore, not the exclusive responsibility of the Company. With respect to the check of newly hired empoyees' eligibility status, the procedure followed is that required by the Board.

> "The present case is clearly one where 'the Board agents nodded' when they should have been alert and active. *Shoreline Enterprises, Inc.* v. *NLRB,* 262 F. 2d 933, 946 (5th Cir. 1959)" (App. B, pp. 41-42).

The court concluded that:

> "We agree with the company that the maladministration of the election made it highly probable that eligible employees were deterred from voting while at least thirty others were allowed to vote after the polls should have been closed. When considered along with the fact that Chenoweth was improperly prevented from voting, in view of the very close results, it is our opinion that the Board *abused its discretion* in refusing to set aside the election." (Citations omitted) (Emphasis added) (App. B, p. 43)

As additional grounds for refusing to enforce the Board's order the court below relied on the misrepresentations in the leaflet distributed by the Union on April 22, the eve of the election (App. B, p. 22). The leaflet is found in the Joint Appendix at pages 125c-125e.

The leaflet was specifically addressed to Mr. Dolezal, the president of the Company (J.A. 70, 130) and said:

> "WHY NOT BE FAIR AND GIVE THE WORKERS THE TRUE FACTS, MR. DOLEZAL
>
> *You* have been making many speeches about Union benefits in every department of the plant, but *you* have never produced one shred of evidence to prove what *you* say. When the worker asks to see the proof, *you* ask them to come to *your* office and *you* will show it to them—SO FAR NOTHING BUT SPEECHES. In *your* New York union contracts which *your* attorneys Seligman and Seligman participated for some of the shoe companies, the following benefits are in effect:" (Emphasis added) (J.A. 125c)

The Union then listed a comparison of the benefits at the plant here in question and those purportedly contained in its New York labor contracts among which was the following comparison:

"Union Benefits	Bata
Clinic—For all union members and dependents: Includes free diagnosis—free doctor—free drugs—free X-ray etc.	Bata has no such clinic and in fact punishes workers who are out sick."

Continuing, the leaflet reads:

> "Therefore, Mr. Dolezal, since your high priced attorneys, Seligman and Seligman, have these New York union agreements, why not be fair and show them to the Bata workers?" (Emphasis added) (J.A. 125(c))

Toward the end of the leaflet, after promising that the workers would not lose any current benefits if they voted for it, the Union stated: "Your Union will negotiate to add to these benefits!"

The court below pointed out that:

(1) The Board itself specifically found that *at least* one pertinent contract "did not reflect the benefits claimed by the Union in its leaflet" (App. B., p. 38).

(2) The most important "Union" health benefit listed was "Clinic—For all union members and dependents: Includes free diagnosis—free doctor—free drugs—free X-ray, etc." and the Board "ignored" the fact that free medical benefits of dependents in New York did not extend to clinical services (App. B., p. 38).

(3) The Regional Director's decision, which was adopted by the Board that the claimed clinic benefits was "sub-

stantially correct" relied erroneously on a clause from the agreement between Boro Medical Center and Union's New York Welfare plan dealing with surgical—not clinical—services. Another clause, in the same agreement, which was in evidence, specifically requires dependents to pay fifty percent of the regular fee for clinic diagnostic services (App. B., p. 39, fn. 15).

(4) The misrepresentations were made by a party in an authoritative position to know the truth (App. B., p. 40).

(5) The leaflet was distributed on the eve of the election which prevented an effective reply prior to the election (App. B., pp. 39-40).

The court also found that the leaflet contained additional misrepresentations because it conveyed to the employees the false impression that the Company had contracts with the Union in New York (App. B., pp. 39-40) which afford workers there substantially greater benefits than were enjoyed by the unorganized voters in this election.

The court pointed out that the Company's position that "your" is reasonably understood to refer to the Company's New York contracts is strengthened by the use in the preceding paragraph of the leaflet of *you* five times in addressing the Company president and *your* as a possessive pronoun in conjunction with *office* to refer to the president's office (App. B., p. 40, fn. 17). The court further stated that if it accepted the position of the Board that "your" was used in this context "by way of designating a class" then the language used implies that *all* New York contracts with the Union contain the listed benefits and the Board has found as a fact that this was not true. Therefore, even under the Board's theory there would be a material misrepresentation of fact (App. B., p. 40).

ARGUMENT

The suggestion that this case presents any issue which justifies a petition by the Government for a writ of certiorari is without foundation.

Petitioner does not argue that the decision of the court below is wrong in finding that the Board's determinations in this case were not supported by substantial evidence. The thrust of Petitioner's argument is that, in spite of the fact that the Board's determinations may be unsupported by substantial evidence, they may not be overruled by the court of appeals unless they are arbitrary, capricious or unreasonable. It is difficult to imagine when any such eventuality would ever take place.

This is certainly not the intent of the statute nor in keeping with this Court's admonition that lower courts "assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past . . . Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bounds." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490.

While the decisions of the Board in framing rules regarding the determination of the appropriate unit for bargaining and the mechanics of the election are entitled to certain deference, this does not mean that the evidentiary findings of the Board may not be reviewed under the substantial evidence standard and that a court of appeals may not draw conclusions from the factual determinations on review.

In all cases Board determinations may be set aside where they are arbitrary, capricious, unreasonable or not

in accordance with the law. Particularly where, as here, the Board's own conduct of the election is at issue, the review by the court of appeals should be given some latitude in examining the Board's determination.

No need for certiorari is shown where the decision of the court below may be sustained on the standards urged by the Petitioner, where there is no conflict of decision on this point among the circuits, and where the determination of the court of appeals is in accordance with the purposes of the statute and the dictates of this Court.

1. The court below applied the correct standards for review.

The court below applied the standards for review which Petitioner itself contends are correct and no amount of strained semantics can convert this case into one warranting review by this Court on certiorari.

(a) The maladministration of the election by the Board agents

As one of the grounds of its holding, the court below found that in refusing to set aside the election because of the maladministration of the election to which the Company had objected, the Board abused its discretion (App. B, p. 43). This is the precise issue which the Board requested the court of appeals to determine.

At the outset of its opinion the court of appeals stated "we approach the merits of this case fully" cognizant that Congress has entrusted the Labor Board "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bar-

gaining representatives by employees." (App. B, pp. 32-33).

In the footnote to its opinion (App. B, p. 43, fn. 21) the court made it crystal clear that it recognized that it is "for the Board and it is not for this [c]ourt to exercise discretion as to 'whether or not the election should be set aside for irregularities in procedure'" (App. B., p. 43, fn. 21) and pointed to its own decisions upholding the Board when the Board exercised its discretion properly. Applying this standard, the court below found that the Board had "abused its discretion" in the case at bar.

Petitioner does not point to any standard for judicial review other than "abuse of discretion" used by the circuit court in reviewing the Board's order, but merely argues that the Board's refusal to set aside the election despite the maladministration of the election was "reasonable", or in other words that it had not abused its discretion. The Union-Intervenor completely ignores this determination of the court and does not discuss this aspect of the case at all in its brief.

It is obvious from an examination of the circuit court's opinion that it was concerned by the fact that the Regional Director and, in turn, the Board, never recognized that a material issue in this aspect of the case is the disparate treatment of employees in regard to their right to vote after the voting line was closed.

The record in this case demonstrates that a fair and equal opportunity to vote was not provided all employees.

Beginning with the period immediately preceding 5:15 p.m. and continuing thereafter, the Board agent gave confusing and contradictory instructions to the voters concerning their eligibility to vote if they were not on line at

5:15 p.m. The Board agent: (1) caused an announcement to be made over the public address system that "to be eligible", employees must be on the voting line by 5:15 p.m. (J.A. 113); (2) instructed three employees at the end of the line that the line was closed (J.A. 113); (3) at least twice refused to let an employee, Frank Chenoweth, vote and ordered him to leave the line because he believed Chenoweth was not on line at 5:15 p.m. (J.A. 115).

Then, in complete contradiction of these actions and of his own broadcast definition that "to be eligible" an employee must have been on line at 5:15 p.m., he permitted several other employees whom he had seen get on line after 5:15 p.m. to remain on line. At 5:20 p.m. he permitted eight to ten more people whom he found in the lobby to get on line and, because he did not take adequate precautions to guard the end of the line, at least 30 more people were permitted to get on line after 5:15 p.m. As late as 6:30 p.m. another employee got on line and voted without question (J.A. 114) and he permitted Helen Stout, the Union observer, to vote at 6:55 p.m. (J.A. 116).

That this disparate treatment must have discouraged eligible voters is evident from the fact that 418 eligible voters did not cast ballots (J.A. 105). When it is seen that only 83% of the eligible voters voted in the instant election as contrasted with a vote of 92% of the eligible voters in the immediately previous election (J.A. 105), it must be assumed that the Board agent's announcement and his other arrangements and activities tended to restrain a number of employees from attempting to vote after 5:15 p.m.[6] Yet, the ballots of more than 30 em-

[6] To assume, as did Judge Bell in his dissent, that election mistakes "cut both ways," is to assume that all elections would end in a tie, or that if some ballots were properly cast, it can be assumed that those not cast would be in the same ratio, an assumption that runs counter to the Board's responsibility to establish an election procedure which will give all eligible employees an opportunity to vote. See cases cited *infra* p. 15.

ployees who failed to heed the Board agent's instructions were counted. Either these 30 employees who were not on line at 5:15 p.m. were eligible voters (in which case those of the 418 employees who properly obeyed the Board agent's instructions and did not attempt to join the line after 5:15 p.m. were likewise eligible, but were deprived of their vote by the Board agent's actions) or else, the 30 employees were ineligible voters (in which case at least 30 ineligible ballots were commingled with the other ballots and materially affected the outcome of the election). In either case, all of the employees of the same class were not given equal treatment, some being deterred from voting while others were permitted to vote and the number of employees who were not accorded an equal opportunity was sufficient to alter the results of this election.

The Board has enunciated the principle that proper election procedure requires every reasonable precaution that a full opportunity to vote be given all those eligible. *G.H.R. Foundry Division, The Dayton Malleable Iron Company,* 123 NLRB 1707, *Star Baking Co.,* 119 NLRB 835, *Alterman-Big Apple, Inc.,* 116 NLRB 1078, *F. H. Vahlsing, Inc.,* 114 NLRB 1451, *Repcal Brass Manufacturing Company,* 109 NLRB 4.

Where not only the Board's rules and procedures are involved but also the Board's actions through its agents, the courts should have some latitude in determining when the Board has abused its discretion. This is particularly true where the maladministration of the election is sufficiently serious to violate the standards enunciated by the Board itself.

Petitioner states that the court set aside the election "on the basis of the Company's contentions that it was highly probable that eligible employees were deterred

from voting" and that "at least thirty others were allowed to vote" (Pet., p. 18).

This gives a misleading picture of the grounds on which the court's decision on this aspect of the case rested.

Not only did the court consider the confusing and contradictory instructions of the Board agent at the close of the voting in making its determination that the maladministration of the election made it highly probable that eligible employees were deterred from voting, while at least thirty others were allowed to vote when the polls should have been closed, but the court pointed to the fact that Chenowith was improperly prevented from voting and that the election results were very close (App. B, pp. 42-43). In addition, the court considered the long lines which formed soon after the polls opened necessitating releasing departments at a time later than designated on the posted schedule, the fact that first shift voters spent an hour on line before receiving a ballot and the fact that the rain and long lines deterred some others from voting (App. B, pp. 42-43, fn. 20).

It is apparent, therefore, that the court had substantial basis for determining that the Board had abused its discretion in refusing to set aside the election because of the irregularities in the election procedure.

(b) The material misrepresentations in the Union's election eve literature.

With respect to the second ground on which the court below refused to enforce the Board's order—the material misrepresentations in the Union's election eve literature—the court concluded that the fact findings of the Board made in connection with the certification were not based on substantial evidence (App. B, p. 41).

Petitioner argues that the ultimate determination for the Board in passing upon objections to an election "involves two elements: (1) ascertaining the facts and (2) making a judgment as to the probable effect of these facts upon the exercise of the employee's free choice." (Pet., p. 13). Petitioner concedes that "the first function frequently requires the Board to make factual findings upon such questions as what the union or the company told the employees, whether those statements were true, etc.—findings which properly are to be tested by the substantial evidence standard" (Pet. pp. 13-14).

But Petitioner contends that as to the second function the court must apply the arbitrary and capricious standard of review.

Petitioner's view of the role of a court of appeals is a strange one. Petitioner in effect contends that if the court finds that the Board erroneously failed to find a misrepresentation, when in fact, there is one, the court of appeals is incapable of determining whether the misrepresentation is material.[7]

Even under the limited scope of review urged by Petitioner, if there were questions of fact, then the appropriate standard for review is substantial evidence on the record as a whole.

Petitioner erroneously asserts that there was no dispute as to the facts (Pet., p. 14). On the contrary, there always had been a dispute as to whether the statements in the union's leaflet were true.

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[7] It should be noted that in the case at bar, the Board never found that the misrepresentations in the election eve literature were not material. The Board merely found that there were no misrepresentations.

The Regional Director, whose report was adopted by the Board, had rejected the company's objections regarding the falsity of the union's assertion that its New York contracts provided for free clinical benefits, holding that the clinical benefits listed were "substantially correct" (J.A. 73).[8]

The Company had demonstrated that the Union's claim that its contracts in New York provided free diagnostic clinic services for employees and dependents was untrue. The Company proved this statement false by submitting to the Board a copy of the agreement between the Board of Trustees of the Welfare Plan of Joint Council 13 and the Boro Medical Center, which is referred to herein as the Boro contract (J.A. 73).

Paragraph 8, page 4 of the Boro contract specifically requires that dependents pay 50% of the regular fee for clinic diagnostic services. The paragraph reads as follows:

> "The Center shall render comprehensive diagnostic services to a dependent or member of immediate family of an employee at a 50% reduction of its regular fee" (J.A. 142).

On the basis of these facts, the court below found that

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[8] In making this finding, the Regional Director erroneously relied on a provision in the Boro contract dealing with a surgical insurance schedule not with the diagnostic clinic services which were the subject of the Union leaflet (J.A. 73). The Board in its brief to the Fourth Circuit compounded the error by inaccurately stating "additional union benefits including free diagnostic services for members and dependents were reflected in the Geller contract under surgical expenses . . ." (Board's Brief, p. 12, fn. 8). Diagnostic clinic services coverage are not described in the Geller contract at all. Only the Boro contract deals with coverage for diagnostic clinic services and this contract concededly does not provide free diagnostic clinical services for dependents. ("Board's Brief" where used herein refers to Board's brief to Fourth Circuit.)

the Board had ignored the fact that free medical benefits for dependents in New York did not extend generally to clinic services (App. B, pp. 38-39).

Petitioner does not dispute the court's findings of fact in this respect and, indeed, concedes that the leaflet was inaccurate in stating that dependents received all clinical services free (Pet., p. 16). Petitioner, thus, inferentially admits that the findings of fact made by the Regional Director and adopted by the Board, upon which was based the ultimate determination that the election constituted a dependable expression of employees' free choice of a bargaining representative, was incorrect.

Petitioner argues that "the court in fact made its own independent judgment as to whether the misstatements in the leaflet were material (Pet., p. 15). The court of appeals did no such thing. The first person to make the finding that the aforementioned representations, if false, were material was the Regional Director whose report was adopted by the Board when he stated "the material issue is whether the benefits are provided for in any New York contract to which the petitioner is a party" (J.A. 74, fn. 7).

Moreover, the conclusion that this issue was material is supported by abundant authority in numerous decisions of the Board. See *Cleveland Trencher Company,* 130 NLRB 600; *Walgreen Co.,* 140 NLRB 1141; *Hollywood Ceramics Company, Inc.,* 140 NLRB 221; *Calidyne Company,* 117 NLRB 1026; *Reiss Associates, Inc.,* 116 NLRB 217; *The Gummed Products Company,* 112 NLRB 1092; *Kawneer Company,* 119 NLRB 1460; *U. S. Gypsum Company,* 130 NLRB 901.

Petitioner argues that the "record does not contain evidence dealing directly with the effect of the leaflet upon

the employees" (Pet., p. 14). The Board has adopted a formula for determining whether or not a misrepresentation affects the free choice of employees. The formula is alluded to in the petition (p. 15, fn.13). The formula itself is the Board's own measure of the effect of the leaflet upon the employees.

The court below applied this formula to the misrepresentations in the union's election eve literature and concluded: ". . . that the Labor Board erred in not setting aside the election under its own standards" (App. B., pp. 40-41).

Thus, the issue was not as to whether misrepresentations, if false, were material or had an impact on the employees. The Board's own rules and decisions as well as the court's decisions and common logic dictate that representations relating to pecuniary benefits are material and when made in a last minute appeal to voters by the party having special knowledge of the true facts will be given particular weight by the employees. Accordingly, the question for the court to determine was whether there were misrepresentations.

The court below was confronted with the same question in determining whether or not the leaflet substantially misrepresented to the employees that the company had contracts with the Union in New York.

The Union, by addressing its leaflet to Mr. Dolezal, the Company President and, at the beginning of the message referring to your New York union contracts, obviously sought to convey to the employees the false impression that the company had contracts with it in New York providing more advantageous provisions than existed in the instant plant.

The Board found that the leaflet contained no misrepresentation and subsequently suggested to the Fourth Circuit that the union did not use the possessive pronoun "your" as a possessive pronoun at all when referring to Mr. Dolezal and his New York contracts participated in by his attorneys.[9] Rather, the Board asked the court to believe that having personally addressed Mr. Dolezal as "you" five times in the preceding paragraphs and having used the word "you" as a possessive pronoun in referring to "your office", the union suddenly switched the meaning of the term in referring to "your New York union contracts" to a general sense "by way of designating a class or type" (Board's Brief, p. 11, fn. 6) and then, in the same sentence, switched the meaning back again to that of a possessive pronoun in referring to "your attorneys".

The court properly refused to believe that the union was engaging in such grammatical legerdemain and found that the leaflet falsely represented to the employees that the Company had contracts with the organized units in New York which afford workers there substantially greater benefits than enjoyed by Maryland employees. (App. B., pp. 40-41).

Thus, an examination of the record reveals that the Board's factual findings on which it made its ultimate determination were erroneous. It relied on the wrong

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[9] Petitioner argues that the language "for some of the shoe companies" in the fourth sentence of the leaflet would correct the false impression that the union had contracts with organized units of the Company in New York containing more advantageous provisions than existed at the Maryland plant. (Pet., p. 16). This interpretation was not urged by the Board in its brief to the Fourth Circuit, nor referred to in its argument. Moreover, an examination of the leaflet demonstrates that the phrase "for some of the shoe companies" was merely designed to show that the attorneys did not participate in all of the New York contracts, and cannot be strained to read as correcting the union's false inferences throughout the leaflet that the Company had contracts with the Union in New York.

contract and the wrong contract provision to find that the Union's claimed health benefits were "substantially correct." Its reading of the union letter to find that the leaflet did not refer to purported Bata contracts in New York was obviously distorted, misconstrues its wording and overlooks the obvious purpose of the Union in using the deceptive phraseology.

In its Twenty Ninth Annual Report, the Board reports the action of the Fourth Circuit in *Singer Sewing Machine Co.* v. *NLRB*, 329 F. 2d 200. The Board stated "[i]n the court's view * * * the Board's determination of the appropriateness of the unit petitioned for by the union was supported by substantial evidence and, therefore, neither arbitrary nor capricious." (See pp. 114-115 of the Twenty-Ninth Annual Report of the National Labor Relations Board).

If credence is given to the Board commentary in *Singer*, then conceivably, the court below in the instant case could have determined that the Board's action was arbitrary and capricious because it was unsupported by substantial evidence.

The correct standard for judicial review to be applied in this type of proceeding has been specified by Congress and interpreted by this Court on numerous occasions. In the instant case, whether there has been a misrepresentation and, ultimately, whether any such misrepresentation is material, are both determinations of fact which must be supported by substantial evidence.

Moreover, Congress never intended that circuit court review of Board decisions in certification proceedings which have become the basis of a final order to bargain in an unfair labor practice proceeding should be limited as proposed by Petitioner.

This Court, in *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 478 fn. 5, quoted from the House Report which described the standard for review to be used by courts of appeals in such cases:

> "Section 9(d) of the Bill provides an exclusive, complete and adequate remedy whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to Section 9(c). * * *
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> * * * *
>
> Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to Section 10(e) or (f), *the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under Section 10(b) and 10(c).* H. R. Rep. No. 972, 74th Cong. 1st Sess. 20" (Emphasis Supplied)

Acceptance of Petitioner's thesis would create a limitation upon the authority of the courts of appeal in Section 10(e) and (f) proceedings which does not appear in the text of those subsections nor is suggested in any way by the opinion of this Court in the leading case, *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. See also *Leedom* v. *Kyne*, 358 U.S. 184.

The cases cited by Petitioner in support of its position are inapposite. In *N.L.R.B.* v. *A.J. Tower Co.*, 329 U.S. 324, the sole question for determination was the reasonableness of a procedural rule—the refusal by the Board to accept a post-election challenge to a ballot—a step in the mechanics of the election, and did not deal with objections to the conduct affecting the result of the election. At page 335, this Court stated it was resting its decision *solely* on

the propriety of the Board's policy against post-election challenges. The Court did not hold that the circuit court could not as a matter of practice review the Board's policy. It merely agreed that the Board's procedure in this particular situation was reasonable.

In *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, this Court recognized that the determination of the appropriate unit for bargaining involves a large measure of informed discretion. However, the substantial evidence test was still applied as the appropriate standard of review. In this regard, this Court emphasized that Section 9(b) of the Act specifically confers upon the Board a broad discretion to determine appropriate units. The Act contains no such provision in Section 10(e) pertaining to the Board's fact-finding powers in objection proceedings.

In *NLRB* v. *Hearst Publications*, 322 U.S. 111, this Court reviewed the denial of enforcement by a court of appeals of a Board order based on a finding that certain newsboys were "employees" within the meaning of the Act. This Court reversed the case, holding that in the "[s]pecific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." (at p. 130).

In *N.L.R.B.* v. *Waterman Steamship Co.*, 309 U. S. 206, this Court merely affirmed the propriety of the action of the Board deferring action on an election petition filed by one union until the company ceased its discriminatory practices against a rival union.

The case of *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123 is distinguished by its concern solely with the mechanics of an election. It did not deal with the truth

or falsity of the union's election eve literature, as Petitioner appears to imply (App. B., p. 17). In Mattison the court said the "notices of election contained a minor and unconfusing mistake in the employer's corporate name." The court of appeals had denied enforcement because the corporate name had been stated as Mattison Machine Manufacturing Company, rather than Mattison Machine Works.

It was in light of the *Mattison* opinion that this Court instructed the Seventh Circuit to reconsider its original opinion in *Celanese Corp.* v. *N.L.R.B.*, 279 F.2d 204, *cert. granted, remanded,* 365 U.S. 297, *enforcement denied,* 291 F.2d 224, *cert. denied,* 368 U.S. 925. On remand, the Court of Appeals held that *Mattison* was totally distinguishable, and this Court denied certiorari.

2. No question of importance is presented

This case does not present the important question Petitioner has elicited from it, as the decision of the court below is warranted even under the limited standard of review which Petitioner contends is appropriate.

Moreover, even if Petitioner's contentions are valid, that the decision of the court below may be sustained only if the standard for review used by the Seventh Circuit in the *Celanese* case *supra* is proper, it offers no basis for certiorari. In the case at bar, Petitioner urges that in spite of the fact that in the *Celanese* case, this Court refused to grant certiorari to review the standard of review used by the Seventh Circuit, it would now be appropriate to review it.

Significantly, the Petitioner does not contend that the dire consequences it predicts have materialized in the six years since the *Celanese* decision. The mere listing of

remote hypothetical possibilities which have not materialized in the past and for which no new basis is offered to infer that such eventualities will occur in the future, does not make an important question.

Petitioner does not assert that there is is a conflict of decision among the circuits on this issue. Indeed, Petitioner points to the fact that the standard of review which it contends was applied here is the same as that applied in a number of cases in the court below and by other courts of appeal (Pet., p. 12).

What are the dire consequences that Petitioner fears? That the Board's case load will increase because more companies and more unions will utilize the Board's established procedure to object to elections which do not reflect the free and uninhibited wishes of the employees, secure in the knowledge that a court of appeals will follow the dictates of this Court in *Universal Camera, supra,* to "assume more responsibility for the reasonableness and fairness of the Labor Board decisions. . . ."

Rather than giving cause for condemnation, this assures the results which the statute was designed to accomplish.

The purpose of a Board election is not, as Petitioner and the Union-Intervenor would have us believe, to assure the designation of a union as an employee's bargaining representative, but rather, as the Board correctly points out in *Hollywood Ceramics, supra,* "to assure the employees full and complete freedom of choice in selecting a bargaining representative" (at p. 233).

Clearly, as long as the true purposes of the law are being attained through an application of the law passed by Congress as interpreted by this Court, as well as numerous courts of appeals, an important question warranting review by this Court has not been raised.

The Union's Memorandum

In its Memorandum, the Union-Intervenor relates certain incomplete data, never a part of the record or pertinent thereto, as background, in an attempt to create the impression of union animus and hostility on the part of the Company. The fact is that in the more than ten years during which the Union has attempted to organize the Bata employees, the Company has not committed a single unfair labor practice. Far from showing union animus on the part of the Company, the "background" regarding previous elections establishes repeated, clear and unequivocal rejections of the Union by the employees in valid elections, the results of which were accepted as the unfettered choice of the employees.

In addition, the Union has chosen to devote the greater portion of its Memorandum to matters which are totally devoid of any relationship to the merits of the question presented to this Court. In the process, it has injected irrelevant and prejudicial hearsay into the dialogue.

The primary thrust of the Memorandum has been directed to the procedural question which was resolved by the court below in a manner favorable to both the Board and the Union and, accordingly, has no bearing on any issue properly before this Court. The Company did not raise any question regarding a denial of due process attributable to the failure to grant a hearing in its brief in the court of appeals and did not argue the matter of its own initiative. The Company has at all times taken the position that the facts of this case relative to the propaganda and conduct of the election clearly preclude the enforcement of the Board's order. Despite the fact that the Company chose to rely on the clear errors of the Board in the conduct of the elections and its judgment of

the campaign literature, Judge Bryan felt strongly that the inadequacies involved in the Board's hearing procedures were of sufficient merit to warrant setting the election aside on that basis alone.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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